INDEMNITY SCHOOL LOCATIONS.

CONSTRUCTION

GIVEN BY THE

HON. SECRETARY OF THE INTERIOR,

TO THE

ACT OF CONGRESS APPROVED MARCH 1, 1877,

ENTITLED

"AN ACT RELATING TO INDEMNITY SCHOOL SELECTIONS IN THE STATE OF CALIFORNIA."

SACRAMENTO:
STATE OFFICE : : : J. D. YOUNG, SUPT. STATE PRINTING.
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To his Excellency GEORGE C. PERKINS, *Governor of California:*

SIR: I have the honor to transmit for your examination a letter received from the Commissioner of the General Land Office, accompanied with a communication from the Hon. Secretary of the Interior, giving the construction that said officer, as the head of the Land Department of the United States, puts upon the Act of Congress approved March 1, 1877, entitled "An Act relating to indemnity school selections in the State of California," and by which said department will be governed in making the adjustment of said indemnity lands between the State and United States.

This decision will affect the title of the State, and consequently of purchasers from the State, of all lands coming within the purview of the Act of Congress referred to. And, notwithstanding the curative effect given to said Act by the construction put upon it by the department, I think it is safe to say that perhaps from one hundred to one hundred and fifty thousand acres of the land now listed to the State, which listing apparently gives the State a valid title as the basis for sales, but it is now evident that the title thus acquired was less real than apparent, and must be remedied in some way. While I do not fully agree with the legal conclusions arrived at by the Hon. Secretary of the Interior as to the extent of the confirmation given to defective locations by the Act of March 1, 1877, yet it is a conclusion equitable as between the State and United States, and if liberally carried out will not injuriously affect the parties who have bought lands from the State in good faith, but the title to which is defective. But in order to execute the law of March 1, 1877, as construed by the Hon. Secretary, it will require an Act of the Legislature, agreeing, on the part of the State, to the conditions of said Act, and giving to the Surveyor-General or to some Commission, as the Governor of the State, the Attorney-General, and Surveyor-General, authority to make the adjustment between the State and the United States, on the basis proposed in this communication of the Hon. Secretary of the Interior, in order that the rights of the purchasers from the State may be protected to the full extent contemplated by the Act of Congress referred to.

It is with this view that I refer the matter to you that you may have time to consider whether or not it should be placed before the Legislature for their action.

I have the honor to be your obedient servant,

JAMES W. SHANKLIN,
State Surveyor-General.

SACRAMENTO, December 9, 1880.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., November 30, 1880.

J. W. SHANKLIN, ESQ., *State Surveyor-General, Sacramento, California:*

SIR: I transmit herewith, for your consideration, copy of the Secretary's decision of the 22d instant, in the matter of the adjustment of the school grant to the State of California, under the provision of the Act of Congress approved March 1, 1877.

Very respectfully,

J. A. WILLIAMSON,
Commissioner.

[COPY.]

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., November 22, 1880.

SIR: I have had under careful consideration your report of August fifth, eighteen hundred and eighty, upon the condition of the California school land grant, and your request for the establishment, by this department, of authoritative rules for its adjustment.

The many accidental, inadvertent, or erroneous certifications heretofore from time to time made to the State of California, of lands selected as indemnity under this grant, without authority of law, and the sale by the State of lands thus selected, have caused great embarrassment to the department in the proper adjustment of the grant, and much uncertainty and confusion of titles in the State, which Congress has endeavored to relieve by the passage of two confirmatory Acts. Notwithstanding what has been done by Congress in the way of providing rules for executive guidance in this matter, by which it was intended to so adjust the grant as to protect as far as possible bona fide purchasers from the State, and at the same time give to the State no greater quantity of land than it would be entitled to receive under the original grant, and to fully protect the interests of the United States and claimants under the general laws thereof, it appears from your report, as you construe the laws and departmental rulings relating to the grant, that there are unconfirmed invalid certifications, which, if allowed to remain intact, will have the effect to pass to the State lands to which it is not entitled, and in excess of the quantity allowed by law.

You express the opinion that the lands thus illegally selected are not of the character contemplated, and were not intended to be granted by the Acts of March 3, 1853 (10 Stats. 224), February 26, 1859 (11 Stats. 385, Sections 2275 and 2276, Revised Statutes), July 23, 1866) (14 Stats. 218), and March 1, 1877 (19 Stats. 267); and that, consequently, under the Act of August 3, 1854 (10 Stats. 346, Section 2449, Revised Statutes), the certified lists, so far as these lands are concerned, are perfectly null and void, and that no right, title, claim, or interest was thereby conveyed to the State.

You therefore suggest that, by virtue of the Act last above mentioned, the Secretary of the Interior has full authority to treat the lists, so far as they embrace such lands, as mere nullities, and the lands as still forming a part of the public domain and subject to dis-

posal under general laws, and to direct the disposal of the same as such; and you recommend the establishment of rules for that purpose.

Undoubtedly the second section of the Act of 1877 vests the department with authority and jurisdiction to inquire and decide whether, and in what cases, indemnity school selections, certified to the State before March 1, 1877, shall fail by reason of the land in lieu of which "they were taken not being included within such final survey of a Mexican grant," as the first section contemplates, or by reason of their being "otherwise defective or invalid," and if found defective or invalid, and not confirmed by the Act, to set aside the certifications, or to treat the selected lands as subject to disposal. (Review in Ketcham's case, November 6, 1880.) For determining what selections "are otherwise defective or invalid" within the meaning of the Act, the rule must be deduced from the seventh section of the Act of 1853, the Act of 1859, and the sixth section of the Act of 1866; and in deciding as to the failure of title, the lands having been certified, it may reasonably be held that Congress intended that the Act of eighteen hundred and fifty-four should be recognized as furnishing the rule.

But after cases have been measured by the rules above mentioned, and it is found that the title to the selected lands fails, and is not conveyed to the State by the Act of eighteen hundred and seventy-seven, the next question for consideration and decision is, whether the Act makes provision for a disposition of such lands. If it shall be found that the Act makes such provision, then it will not be necessary in this matter to discuss the question of the authority of the government, by virtue of the Act of eighteen hundred and fifty-four, to dispose of these lands under general laws without first procuring a vacation or annullment of the lists by judicial decree. It is, therefore, proper to consider first whether authority and provision for their disposition are given by the Act of March 1, 1877. If not, then the question of authority under the Act of 1854, and said Section 2449, will be fully considered and determined. In considering whether or not the Acts of 1866 and 1877, being properly construed, afford a complete rule for executive guidance out of the difficulties occasioned by the irregularities and unauthorized Acts above mentioned, and by which the grant, so far as selections thereunder were certified prior to March 1, 1877 are concerned, may be properly, and, as the surveys in California become complete, finally adjusted, and by which lands that have been selected and certified without authority, the title to which is not confirmed, may be disposed of, it will be proper to ascertain.

First—What classes of selections the Act of 1877 confirms to the State.

Second—What classes of invalid selections it does not confirm, and whether or not all of the lands illegally selected and certified, as aforesaid, the title to which is not confirmed to the State, may be disposed of under its provisions.

I may here state, for the sake of avoiding repetitions, that in determining what selections are confirmed by the Act of 1877, the conclusions reached must be understood as subject always to the conditions, limitations, and exceptions of the third and fourth sections, and that the Act relates exclusively to selections that were certified prior to its passage.

The first section confirms selections based upon the sixteenth and

thirty-sixth sections of land, or what would be so designated if the public surveys were extended over them, which have been or shall be found to lie within the limits of Mexican grants, as finally surveyed, where the selections were made prior to the final surveys of such grants, provided the selected lands were subject to disposal by Congress, March 1, 1877. The second section confirms "indemnity school selections" as follows:

First—Where the title to the lands selected shall fail by reason of the lands in lieu of which the selections were made not being included within the final survey of a Mexican grant, except as hereinafter specified.

Second—Where the selections "are otherwise defective or invalid," except as limited by the first proviso.

In arriving at what is considered the proper construction of the words "or are otherwise defective or invalid," found in this section, the department was met at an early day by many difficulties. But the matter has had careful and patient attention, and full consideration, not only in this department, but by the Attorney-General as well, after exhaustive argument.

It will not be necessary to point out the many difficulties in the way of construing this section, nor to specify the objections urged against the construction finally adopted. It is sufficient to say that the main objection that to give to the words quoted above the broad meaning which they impart, and not to limit their meaning by the other language of the section, would render other portions of the Act redundant, or perhaps unnecessary, was urged, ably argued, fully considered, and held to yield to what was deemed to be the intention of Congress. What that construction is will appear upon examination of the opinion of the Attorney-General and decisions of this department hereinafter referred to. The first construction placed upon the second section of the Act by this department was announced in the decision of the case of Rosmus Jackson et al. vs. The State of California, rendered August 10th, 1877 (Capp's L. O. vol. 4, p. 87).

In that case, after stating the wide difference between the opinion of counsel for the State and that of counsel for the settlers "as to the extent of the confirmation" by the second section, it was held as follows:

> I am of the opinion that the second section of this Act confirms to the State all indemnity school selections which had been certified to the State prior to its passage, except those lands occupied by bona fide settlers prior to certification; and, excepting also, the class named in the first proviso thereof, which are not confirmed, but simply subject to the right of purchase from the government by the innocent purchaser from the State. The words "are otherwise defective or invalid," in my opinion refer to selections that were defective or invalid for some other reason than that the lands in lieu of which they were made shall be excluded on final survey from a Mexican grant, as in the case where the sixteenth and thirty-sixth sections have been lost to the State, and the irregularity is in the condition of the land selected. With this class there was no necessity for Congress to provide for the disposition of the sixteenth and thirty-sixth sections, for they had been disposed of by the government and lost to the State, and a simple confirmation because they were otherwise defective or invalid, on account of the condition of the land selected, was all that was required to quiet the title.

It may be stated here that selections made for losses under the seventh section of the Act of 1853, as construed by the sixth section of the Act of 1866, and for deficiencies under the Act of 1859, are alike "indemnity school selections."

After said decision was rendered, the matter of the construction of the Act was, upon request of the attorneys for the settlers, submitted

to the Attorney-General for opinion, before whom it was fully argued both by the attorneys for the settlers and the State, and the Attorney-General rendered his opinion thereon July 12th, 1878.

It will be observed that the Attorney-General holds, what was not expressly stated in my decision, but might be fairly inferred therefrom, that the Act of 1877 was not intended to give to the State any more land than it would be entitled to receive under the original grant, and that in all respects his opinion sustained the views of this department upon the construction of the Act.

After setting out briefly the argument of the attorney for the settlers upon the construction of the words, "or are otherwise defective or invalid," the Attorney-General says:

> But in the view of the case which presents itself to me, it seems that these words are intended to confirm to the State, in spite of any defects or invalidities which have existed in its selections, the lands selected, other than the defect arising from the fact that there was no original basis for the selection, and that a confirmation of this character can only be interpreted properly as in the nature of a grant *de novo* of the lands thus selected.

And again, further on:

> The statute is in its nature a remedial statute, is to be construed generously in order to give to the State the benefit which it was entitled to receive for school purposes, and to relieve the difficulties which had arisen in the State by reason of the peculiar complications from the Mexican grants.

Therefore, in addition to the selections clearly confirmed by section one and the first part of section two, specifically above defined, it follows that in whatever other respect indemnity school selections are defective or invalid, they get confirmation by the Act of 1877, provided it has been or shall be ascertained that the State has actually sustained a loss or deficit under the Act of 1853 or 1859, for which the selections purport to have been made, and provided further that the land selected was free from reservation and subject to disposal by Congress, March 1, 1877.

The opinion from which the foregoing quotations were made, was adopted by my modified decision in said case, July 17, 1878, wherein it was stated that the same sustained the views of this department, upon the construction to be given to said Act as expressed in the decision of August 10, 1877. The opinion therefore has become the recognized and established rule of this department, not only as to the construction of the words, "or are otherwise defective or invalid," but to the full extent of the Attorney-General's construction of the Act in all other respects. Now bearing in mind that it was held by the department, August 10, 1877, and again July 17, 1878, after the adoption of the Attorney-General's opinion, that the Act of 1877 confirmed a large number of selections in the case of Jackson et al. vs. The State, an inquiry into the character of the selections thus held to be confirmed will show, to that extent, the particular classes of cases to which the Act as construed extends.

In the first place, it may be stated that all of the selections were defective in this: that the lands selected were in a state of reservation at the time the selections were made, but were subject to disposal by Congress, March 1st, 1877, by reason of the removal of the reservation. Tracts claimed in that case by George M. Lincke, John W. Williams, and Joel P. Rushling, had been selected by the State in lieu of

school sections ascertained by final surveys to be included in Mexican grants.

The bases of the selections, therefore, at the time the selections were made, were absolutely in all respects legal. The selections were, consequently, in no way irregular or invalid by reason of being prematurely made. The invalidity or irregularity was otherwise than in the bases of the selections.

Tracts claimed by P. A. Woolston, W. Birmingham, and Rasmus Jackson, had been selected in lieu of a deficiency under the Act of 1859. Tracts claimed by Rasmus Jackson, James M. Prather, and several others, parties to that contest, had been selected in lieu of sixteenth and thirty-sixth sections, supposed to be lost to the State, prior to final survey of the grants embracing them, but which, upon final survey, were found to be included in the grants. The selections of these tracts, therefore, were defective both as regarded the sixteenth and thirty-sixth sections in lieu of which they were made and the land selected.

You report a class of selections not involved in the case above mentioned, viz.: selections of land in one land district in lieu of losses or deficiencies in another district. It appears to me that such selections are as clearly confirmed by the second section of the Act of 1877 as any others that are defective or invalid.

The Act of 1877 virtually abrogates the legislative rule found in the seventh section of the Act of 1853, and the sixth section of the Act of 1866, requiring indemnity selections to be made in the land district in which the loss or deficiency occurs, so far as relates to the adjustment of selections certified prior to March 1, 1877. At all events, this Act makes no distinction as regards the confirmation or the disposition of selected lands, between selections, defective or invalid by reason of their having been made in violation of that rule, and selections defective or invalid for other reasons. It would, therefore, appear that both classes of indemnity selections, that provided for by the Act of 1853, as construed by the sixth section of the Act of 1866, and that under the Act of 1859, are contemplated by the Act of 1877, and that the words, "or are otherwise defective or invalid," relates to defects and invalidities other than those particularly stated in section one and the first part of section two.

In the matter of the application of the State Surveyor-General of California to have an indemnity school selection canceled for invalidity, decided by this department September 6, 1880, it was found that the selection was made in 1869 and certified in 1870, in lieu of a part of a thirty-sixth section, which the State alleged it was compelled to relinquish for the reason that the section was in a grant; that the section is now known to be in place, and that it is unsurveyed public land; and it was held that the tract in lieu of which the selection was made, when surveyed, will be treated as excluded from a final survey within the meaning of the Act of 1877, and the selection as confirmed by that Act.

Hence, without recapitulating or further particularizing the classes of selections confirmed by said Act, according to the construction thereof adopted by the department, as shown above, it may be stated as a rule for future guidance in adjusting the grant that, in all cases of defective or invalid indemnity school selections made and certified prior to the passage of the Act, wherein by approved public surveys, or by the final surveys of Mexican grants, it has been, or

may hereafter be ascertained, that the deficiencies or losses in lieu of which the selections were made, actually exist; and in all cases wherein it shall appear that the selections were made in anticipation of the surveys of Mexican grants in lieu of sixteenth or thirty-sixth sections, supposed or alleged by the State to be lost in such grants, but where, upon final survey of such grants, or by approved public surveys, made or approved after the passage of said Act, such school sections shall be found in place, and not included in any grant, the selections will be treated as confirmed, provided the selected lands were subject to Congressional disposition at the date of the Act. Having thus ascertained what classes of selections are confirmed, it remains to determine what classes are not confirmed, and whether, or in what cases the Act makes provisions for the disposition of the selected lands. It might be said generally that no invalid selection is confirmed that does not come within the rule above stated. But in order to avoid as far as possible any misunderstanding of the rule, it may be well to state it negatively as to some classes of selections.

In the first place, selections made in anticipation of the surveys of Mexican grants in lieu of school sections supposed or alleged to be lost therein, which sections, however, were subsequently excluded from the final surveys of such grants and surveyed as public land prior to the passage of the Act, are not confirmed. Upon this point the Attorney-General, in his opinion, said: "It is not questioned that the effect of this section is to confirm to the State of California the selections of lands made by it as indemnity for those sections which have been since found not to have been included within the final survey of a Mexican grant, and to reinvest the United States with the title thereto, to be disposed of as other public lands of the United States."

Undoubtedly the Attorney-General used the adverb *since* as relating to the date of the Act, that is, in the sense, that *since the passage of the Act* those sections have been found not to have been included within the final survey of a Mexican grant. This would appear to be put beyond question by reading the second section of the Act, which upon this subject is prospective.

It provides "that where indemnity school selections have been made and certified to the State, and said selections shall fail * * * the same are hereby confirmed, and the sixteenth or thirty-sixth sections in lieu of which the selection was made *shall upon* being excluded from such final survey, be disposed of as other public lands of the United States."

The language of the Attorney-General, as well as that of the Act itself, excludes from confirmation selections of the class now under consideration. In such cases, therefore, provision is made in the provisos to the second section for the disposition of the selected lands; for there was no such sixteenth or thirty-sixth sections as the Act provides shall be disposed of as other public lands (see case of Henry Seaman, decided by the department, November 5th, 1880); and as already held, the State can take no greater quantity of land by virtue of this Act, than it was entitled to by the original grant in other words, in no case can the State take both the selected lands and the school sections in lieu of which the lands were selected.

To construe the Act otherwise, in this respect, would place Congress in the position of having attempted to reinvest the United

States with a title already absolutely vested in fee-simple in the State of California, without the consent or concurrent action of the grantee, or of intending by this Act to enlarge the original grant.

Again, the Act does not confirm selections made in lieu of sixteenth and thirty-sixth sections that were surveyed, and thus known to be in place at the time the selections were made. In such cases the title to the school section had already vested in the State, and there are no such sixteenth or thirty-sixth sections as the Act provides shall be disposed of as public lands. It follows, therefore, that provision is made for the disposal of the selected lands under the provisos to the second section.

As regards this class of selections, it was held by the department in the case of Watson v. The State, decided January 28, 1880 (Copp's L. O. vol. 6, p. 193), as follows:

> The certification had, therefore, independent of the confirmation of the Act of 1866, to save bona fide purchasers, no basis whatever; and even if confirmed by that Act, the selection should have been taken for a specific tract actually lost to the State, in order to satisfy the condition that no greater quantity should be approved to the State for school purposes than she was already entitled to by law * * *. This being the condition of the selection, which cannot stand under the Act of 1866, it must now be considered with respect to the Act of March 1, 1877.

After considering the selection with respect to that Act, the Department held as follows:

> I am, therefore, of the opinion that the selection falls within the intent of the first proviso to the Act of 1877, and is not confirmed, as there was no sixteenth or thirty-sixth sections designated at the date of the selection for which indemnity could be claimed; the particular section indicated not being within the unsurveyed limits of a private grant, but surveyed public land, the title to which was already in the State.

Thus, it appears that this class of selections gets no confirmation, either by the Act of 1866 or 1877. I am aware that a contrary opinion as to confirmation under the Act of 1866 is expressed in the decision in the case of Dersch vs. The California and Oregon Railroad Company, rendered February 24, 1880; but that case was passed without having the prior one of Watson vs. State in mind. The law of the matter is correctly stated in the last named decision.

Again, the Act confirms but one selection in lieu of any designated loss or deficiency, and that, necessarily, is the first one; and in case of a second, third, or any selection after the first, there can be no difficulty in treating the selected lands as subject to disposal under the provisos aforesaid, for there is no such sixteenth or thirty-sixth sections as can be excluded from a final survey and revert to the United States. (Case of Henry Seaman, above cited.) In discussing this class of selections the Attorney-General, in his opinion, said:

> As I am informed, by your letter, that in certain cases two or more selections have been made in lieu of the same sixteenth or thirty-sixth section of land, I ought to add that I do not, by this opinion, intend to imply that the State is entitled to more than one selection in lieu of any one section. By the statute of July 23d, 1866, in regard to school lands in California, it was provided that the State of California could not receive, under this Act, a greater quantity of land for school or improvement purposes than she was entitled to by law. And, although this proviso is not repeated in the Act which we are at present considering, yet there is nothing in it from which it can be fairly inferred that where double selections are made they were to be ratified, or that the State was, by reason of any mistake in the making of duplicate selections, to obtain a greater quantity of land than had originally been allowed by law for school purposes.

Should cases arise in which it is found that more land was certified than the State was entitled to receive, by reason of the bases designated, which will include cases in which there were no bases, present or prospective, the selection as to the excess should be treated as in the case of duplicate selections, except that in case of any given excessive selection the State should be notified to elect, within a certain period, which portion of the selected lands it will retain.

Thus, it would appear that the Act of 1877 provides a complete rule for adjusting said grant, as regards selections made and certified prior to its passage, and makes provision for the disposition of selected lands, the title to which is not thereby confirmed to the State, and vests the department with jurisdiction over such lands. It is, therefore, unnecessary to look to other Acts for authority in the premises.

In conclusion, I will say that selections are confirmed by the Act of 1877 only to the extent of the actual losses or deficiencies designated as bases therefor, except where the tracts named as bases revert to the United States, under the provisions thereof, for disposal, as other public lands; that all lands, the selections whereof are not confirmed, fall within the provisos aforesaid for disposition, for the reason that in such cases there are no sixteenth or thirty-sixth sections the title to which the Government can resume; and that the words, "such sixteenth or thirty-sixth sections," found in the first proviso to the Act, are construed to embrace and mean such school sections, designated as the bases of selections, as might be excluded from the final surveys of grants, or found in place by public surveys after the passage of the Act.

Hence, where sections certified as aforesaid shall be found defective or invalid, and adjudged by you to fail for any of the reasons contemplated by the Act of 1877, as herein construed, and not confirmed thereby, the State Surveyor-General should be duly notified of your decision in the premises, and advised that a certain time, say ninety days from date of notice, will be allowed within which any purchaser of the land from the State may appear to perfect his claim under the second section of the Act, and that if no one claiming as such purchaser shall come forward and establish his right to enter the land within such time, the land, from and after the expiration of such period, will be subject to disposal under the general land laws of the United States.

Very respectfully,

C. SCHURZ, Secretary.

The Commissioner of the General Land Office.

[Public—No. 38.]

AN ACT

RELATING TO INDEMNITY SCHOOL SELECTIONS IN CALIFORNIA.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the title to the lands certified to the State of California, known as indemnity school selections, which lands were selected in lieu of sixteenth and thirty-sixth

sections lying within Mexican grants, of which grants the final survey had not been made at the date of such selection by said State, is hereby confirmed to said State in lieu of the sixteenth and thirty-sixth sections for which the selections were made.

SEC. 2. That where indemnity school selections have been made and certified to said State, and said selections shall fail by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, or are otherwise defective or invalid, the same are hereby confirmed, and the sixteenth or thirty-sixth section in lieu of which the selection was made shall, upon being excluded from such final survey, be disposed of as other public lands of the United States; *provided*, that if there be no such sixteenth or thirty-sixth sections, and the land certified therefor shall be held by an innocent purchaser for a valuable consideration, such purchaser shall be allowed to prove such facts before the proper land office, and shall be allowed to purchase the same at one dollar and twenty-five cents per acre, not to exceed three hundred and twenty acres for any one person; *provided*, that if such person shall neglect or refuse, after knowledge of such facts, to furnish such proof and make payment for such land, it shall be subject to the general land laws of the United States.

SEC. 3. That the foregoing confirmation shall not extend to the lands settled upon by any actual settler, claiming the right to enter not exceeding the prescribed legal quantity under the homestead or preëmption laws; *provided*, that such settlement was made in good faith, upon lands not occupied by the settlement or improvement of any other person, and prior to the date of certification of such lands to the State of California by the Department of the Interior; *and provided further*, that the claim of such settler shall be presented to the Register and Receiver of the District Land Office, together with the proper proof of his settlement and residence, within twelve months after the passage of this Act, under such rules and regulations as may be established by the Commissioner of the General Land Office.

SEC. 4. That this Act shall not apply to any mineral lands, nor to any lands in the City and County of San Francisco, nor to any incorporated city or town, nor to any tide, swamp, or overflowed lands.

Approved March 1st, 1877.